

**BISNAR | CHASE LLP**  
BRIAN D. CHASE (164109)  
bchase@bisnarchase.com  
JERUSALEM F. BELIGAN (211258)  
jbeligan@bisnarchase.com  
1301 Dove Street, Suite 120  
Newport Beach, CA 92626  
Telephone: 949/752-2999  
Facsimile: 949/752-2777

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**  
JANINE L. POLLACK (*pro hac vice*)  
pollack@whafh.com  
DEMET BASAR (*pro hac vice*)  
basar@whafh.com  
KATE M. MCGUIRE (*pro hac vice*)  
mcguire@whafh.com  
270 Madison Avenue  
New York, New York 10016  
Telephone: 212/545-4600  
Facsimile: 212/545-4653

**LEXINGTON LAW GROUP**  
MARK N. TODZO (168389)  
mtodzo@lexlawgroup.com  
LUCAS WILLIAMS (264518)  
lwilliams@lexlawgroup.com  
503 Divisadero Street  
San Francisco, CA 94117  
Telephone: 415/913-7800  
Facsimile: 415/759-4112

Attorneys for Plaintiffs  
[Additional Counsel Listed on Following Page]

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

IN RE FONTEM US, INC.  
CONSUMER CLASS ACTION  
LITIGATION

Case No.: 8:15-cv-01026-JVS-RAO

**PLAINTIFFS' REPLY  
MEMORANDUM OF LAW IN  
FURTHER SUPPORT OF  
MOTION FOR CLARIFICATION  
OR RECONSIDERATION, OR, IN  
THE ALTERNATIVE, ENTRY OF  
JUDGMENT PURSUANT TO  
FRCP 54(b), OR CERTIFICATION  
FOR INTERLOCUTORY APPEAL**

Judge: Hon. James V. Selna  
Mag. Judge: Hon. Rozella A. Oliver

Date: February 13, 2017  
Time: 1:30 p.m.  
Place: Courtroom 10C

PLAINTIFFS' REPLY MEM. IN FURTHER SUPPORT OF MOTION FOR CLARIFICATION  
OR RECONSIDERATION, OR, IN THE ALTERNATIVE, ENTRY OF JUDGMENT  
PURSUANT TO FRCP 54(b), OR CERTIFICATION FOR INTERLOCUTORY APPEAL

**LEVI & KORSINSKY LLP**

EDUARD KORSINSKY  
ek@zlk.com  
SHANNON L. HOPKINS (*pro hac vice*)  
shopkins@zlk.com  
NANCY A. KULESA (*pro hac vice*)  
nkulesa@zlk.com  
STEPHANIE A. BARTONE (*pro hac vice*)  
sbartone@zlk.com  
30 Broad Street, 24<sup>th</sup> Floor  
New York, NY 10004  
Telephone: 212/363-7500  
Facsimile: 866/367-6510

**COHELAN KHOURY & SINGER**

TIMOTHY D. COHELAN (60827)  
tcohelan@ckslaw.com  
ISAM C. KHOURY (58759)  
ikhoury@ckslaw.com  
MICHAEL D. SINGER (179630)  
msinger@ckslaw.com  
JEFF GERACI (151519)  
jgeraci@ckslaw.com  
605 "C" Street, Suite 200  
San Diego, CA 92101  
Telephone: 619/595-3001  
Facsimile: 619/595-3000

**LAW OFFICES OF MICHAEL P. SOUSA, APC**

MICHAEL P. SOUSA (229416)  
msousa@msousalaw.com  
3232 Governor Drive, Suite A  
San Diego, CA 92122  
Telephone: 858/453-6122  
Facsimile: 858/453-2155

**JOSE GARAY, APLC**

JOSE GARAY (200494)  
jgaray@garaylaw.com  
9861 Irvine Center Drive  
Irvine, CA 92618  
Telephone: 949/208-3400  
Facsimile: 949/713-0432

**THE WILNER FIRM**

RICHARD J. LANTINBERG  
rlantinberg@wilnerfirm.com  
444 East Duval Street  
Jacksonville, FL 32202  
Telephone: 904/446-9817  
Facsimile: 904/446-9825

**SCOTT+SCOTT LLP**

CHRISTOPHER M. Burke (214799)  
cburke@scott-scott.com  
JOHN T. JASNOCH (281605)  
707 Broadway, Suite 1000  
San Diego, CA 92101  
Tel: 619/233-4565  
Fax: 619/233-0508

**FORCHELLI CURTO DEEGAN  
SCHWARTZ MINEO &  
TERRANA, LLP**

ELBERT NÁSIS  
enasis@forchellilaw.com  
The Omni  
333 Earle Ovington Boulevard, Suite 1010  
Uniondale, NY 11553  
Telephone: 516/248-1700  
Facsimile: 516/248-1729

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## I. INTRODUCTION

Plaintiffs respectfully submit this reply memorandum in further support of their motion for clarification or reconsideration of the Order,<sup>1</sup> or, in the alternative, entry of judgment pursuant to Rule 54(b), or certification for interlocutory appeal under 28 U.S.C. §1292(b) (Dkt. 99) (the “Motion”). In their opposition memorandum (Dkt. 102) (“D. Mem.”), Defendants incorrectly argue that the Court should deny the motion, relying on overly narrow interpretations of rules and case law that they contend deprive the Court of the authority to clarify or correct its own Order even if it is unclear or erroneous or results in manifest injustice. Defendants, moreover, wrongly assert that this Court should not facilitate an appeal even if that appeal is necessary for fairness and judicial efficiency.

The substantive issue as to reconsideration is whether it was clear error or manifestly unjust for the Court to divest Plaintiffs of substantive rights by impliedly interpreting the Final Rule to have retroactive effect when it dismissed with prejudice Plaintiffs’ claims that accrued prior to the passage of the Final Rule with prejudice. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), compels the conclusion that the preemptive effect of the Final Rule should not retroactively divest Plaintiffs of substantive rights they had prior to the Effective Date of the Final Rule and on which they relied. Moreover, at the time the Court issued the Order, because the parties submitted their Supplemental Memoranda simultaneously, it did not have before it the full “continue in effect” analysis because Plaintiffs could not have reasonably foreseen that Defendants would make their misguided “continue in effect” argument for the first time in their Supplemental Memorandum. Defendants’ position that the Court cannot reconsider its Order is contrary to a well-established body of Ninth Circuit and Central District law, including this Court’s ruling in

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<sup>1</sup> Capitalized terms herein have the same definition provided for them in Plaintiffs’ opening memorandum on this motion.

1 *Network Signatures, Inc. v. ABN-AMRO, Inc.*, No. SACV 06-629 JVS (RNBx),  
2 2007 U.S. Dist. LEXIS 48332, at \*5 (C.D. Cal. Apr. 10, 2007) (Selna, J.), which  
3 indisputably holds that a court has the discretion to revisit its own rulings in order to  
4 ensure a proper result.

5 Plaintiffs submit that, under the circumstances, it would be manifestly unjust  
6 for the Order, which extinguishes their rights, to stand, and respectfully request that  
7 the Court grant their Motion for clarification or reconsideration. In the event that  
8 the Court denies both forms of relief, Plaintiffs respectfully submit that the court  
9 should enter judgment on the Dismissed Claims and Dismissed Plaintiffs under Rule  
10 54(b) or grant certification of the preemption issues for interlocutory appeal under  
11 28 U.S.C. § 1292.

## 12 **II. CLARIFICATION IS WARRANTED**

13 As Defendants concede, “[a] court may clarify its order for any reason,” and  
14 clarification may be appropriate where there is “ambiguity or confusion, that further  
15 explanation can cure.” D. Mem. at 4 (internal quotation and citation omitted). As  
16 Plaintiffs show in their opening memorandum in support of this Motion (“Opening  
17 Memorandum” or “Opening Mem.”), clarification is warranted because the Order is  
18 internally contradictory and thus ambiguous. The Court found “preemption began  
19 on August 8, 2016.” Order at 14. But yet, it also “dismiss[ed] counts 1–3 and 5–7  
20 with prejudice,” Order, at \*14, even though those counts arose, and were pled by  
21 Plaintiffs, *well* before August 8, 2016. The latter holding is internally inconsistent  
22 with the Court’s finding regarding the start date for preemption. Inconsistency  
23 within a court’s order gives rise to confusion, which is a proper basis for  
24 clarification.

25 Defendants’ attempted distinction of *Tessera, Inc. v. UTAC (Taiwan) Corp.*,  
26 No. 5:10-cv-04435-EJD, 2016 U.S. Dist. LEXIS 5654, at \*\*9-10 (N.D. Cal. Jan. 15,  
2016) (D. Mem. at 5), fails. Defendants acknowledge that in *Tessera*, clarification

1 was granted because “the order did not address [certain] arguments” or “encompass  
2 a specific issue.” Plaintiffs’ position here is analogous: the Court gave the Final  
3 Rule retroactive effect but failed to acknowledge that it was doing so or address  
4 several of Plaintiffs’ arguments showing that the Final Rule should not be given  
5 retroactive effect. Thus, Plaintiffs’ request for clarification is appropriate and  
6 should be granted.

### 7 **III. RECONSIDERATION IS SUBSTANTIVELY WARRANTED**

8 Plaintiffs’ motion for reconsideration is founded on substantively solid  
9 grounds. Plaintiffs have proffered case law clearly demonstrating the accuracy of  
10 their positions. In their Opening Memorandum, Plaintiffs cited several cases  
11 evidencing the applicability of *Landgraf* and demonstrating that Plaintiffs’  
12 interpretation of the language “continue in effect” is correct. Defendants have failed  
13 to demonstrate the contrary.

#### 14 **A. *Landgraf*, Not *Bradley*, Governs the Retroactivity Analysis**

15 Defendants assert that the Court “correctly found that a *Landgraf* retroactivity  
16 analysis does not apply to the present action.” D. Mem. at 16. First, the Court made  
17 no such finding. The sole statement this Court made about *Landgraf* was that “the  
18 United States Supreme Court did not discuss preemption in *Landgraf*.” Order at 14,  
19 n.9. Second, as set forth in Plaintiffs’ Opening Memorandum, *Landgraf* is the  
20 standard that governs all retroactivity questions, including preemption. *See* Opening  
21 Mem. at 14 (citing *DiPetrillo v. Dow Chem.*, 729 A.2d 677 (R.I. 1999) (applying  
22 *Landgraf* and declining to give retroactive application to similar “continue in effect”  
23 language), and *Feinberg v. Colgate-Palmolive Co.*, 2012 NY Slip Op 50515(U), ¶ 3,  
24 34 Misc. 3d 1243(A), 950 N.Y.S.2d 608 (N.Y. Sup. Ct. 2012), (same)). *See also*  
25 *W.R. Huff Asset Mgmt. Co., L.L.C. v. BT Secs. Corp.*, 190 F. Supp. 2d 1273, 1278  
26 (N.D. Ala. 2001) (applying *Landgraf*, and ruling that SLUSA preemption did not  
27 apply to case where a plaintiff’s claims arose before SLUSA enacted).

1 The Ninth Circuit makes clear the necessity of performing a *Landgraf*  
2 analysis to determine whether a new law should be applied retroactively where its  
3 application, as would be the case here, would take away a cause of action that a  
4 plaintiff had and relied on before the new law was enacted. For example, in *Scott v.*  
5 *Boos*, 215 F.3d 940 (9th Cir. 2000), the Ninth Circuit performed a *Landgraf* analysis  
6 and found that “[t]aking away a plaintiff’s right to a remedy under RICO would  
7 have the same” type of retroactive effect that was found prohibited in *Landgraf*. *Id.*  
8 at 943-50. See also Plaintiffs’ Supplemental Mem. at 10. *Scott* also provided the  
9 standard on which the Ninth Circuit relied in *Beaver v. Tarsadia Hotels*, 816 F.3d  
10 1170, 1188 (9th Cir. 2016), a case concerning an amendment to the Interstate Land  
11 Sales Full Disclosure Act (“ILSFDA”) (discussed in detail in Plaintiffs’ Opening  
12 Mem. at 19), for its holding under *Landgraf* that a statute would have impermissible  
13 retroactive effect if it would deprive plaintiff of a cause of action that he had  
14 previously possessed.<sup>2</sup> Defendants’ attempts at distinction fail to address this point.  
15 D. Mem. at 17-20.

16 Defendants’ continued reliance on *Bradley v. Richmond School Board*, 416  
17 U.S. 696, 711 (1974) is unavailing. D. Mem. at 16. As detailed in the Opening  
18 Memorandum, *Landgraf* (on which Plaintiffs relied in their Supplemental  
19 Memorandum) clarified and distinguished *Bradley*, explaining that *Bradley*’s  
20 application of new law to a pending case is limited to cases where, unlike here, the  
21 law is “collateral to the main cause of action” and “uniquely separable from it.”  
22 *Landgraf*, 511 U.S. at 277 (internal quotations and citations omitted). The Ninth  
23 Circuit thus clearly agreed with Plaintiffs’ interpretation of the relationship between

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24 <sup>2</sup> Defendants’ argument that Plaintiffs cannot cite *Beaver* because they have  
25 previously cited it and Rule 7-18 precludes repetition is misplaced, because a certain  
26 amount of reference to prior arguments is necessary for context, because one cannot  
27 identify something overlooked without referencing it, and because Local Rule 7-18  
28 has no impact on reconsideration granted under the Court’s inherent authority.

1 *Bradley and Landgraf*. See *Covey v. Hollydale Mobilehome Estates*, 125 F.3d 1281,  
2 1281 (9th Cir. 1997) (citing *Landgraf* as distinguishing *Bradley* and refusing to  
3 apply new regulations retroactively where they were “not collateral to or separable  
4 from Appellants’ claims.”).

5 **B. *Akee*, Cited by Defendants, Is Inapposite and Does Not Distinguish**  
6 **Plaintiffs’ Cited FIFRA Cases That Interpret “Continue in Effect”**

7 *DiPetrillo*, 729 A.2d 677 and *Gibson v. Dow Chem. Co.*, 842 F. Supp. 938  
8 (E.D. Ky 1992), strongly support Plaintiffs’ position that the “continue in effect”  
9 language does not cause a preemption clause to be retroactive. In arguing that these  
10 cases are distinguishable, Defendants rely heavily on *Akee v. Dow Chem. Co.*, 272  
11 F. Supp. 2d 1112 (D. Haw. 2003), which they assert shows that the “continue in  
12 effect” language requires this Court to find that Plaintiffs’ claims based on conduct  
13 that pre-dates the Effective Date are preempted. *Akee* is poorly reasoned. Citing  
14 only *Southwest Center for Biological Diversity* (which, as discussed below, is  
15 distinguishable), *Akee* holds that “generally, a court applies the law in effect at the  
16 time the court renders its decision.” *Akee*, 272 F. Supp. 2d at 1125. The  
17 shortcoming of *Akee* is that its analysis fails to take into account the tension with the  
18 anti-retroactivity principle discussed in *Landgraf*, 511 U.S. at 265. As discussed  
19 herein, the presumption against retroactively applying statutory amendments to  
20 deprive plaintiffs of substantive rights on which they relied governs here.

21 Rejecting *DiPetrillo* and *Gibson* without analysis, *Akee* instead favorably  
22 cites *Ark.-Platte & Gulf Pshp. v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 160  
23 (10th Cir. 1992) and *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla.  
24 1989), two non-binding cases which are distinguishable. In *Ark.-Platte*, the court  
25 found that retroactivity of a new FIFRA provision was not a concern because the  
26 claim of pollution to a property did not arise until the plaintiff acquired its property,  
27 which (unlike here) was *after* the amendment to FIFRA. And, as discussed in  
28 *Gibson*, 842 F. Supp. at 940, “*Kennan* is simply incorrect that permitting a failure to

1 warn claim based on events prior to 1972 would violate FIFRA as it presently exists  
2 [because] [p]ermitting a damage award for failure to warn prior to 1972, would have  
3 absolutely no effect on the manner in which FIFRA operates in 1992.” *Id.* at 940.

4 The *Gibson* Court went on to explain that:

5 [u]nder FIFRA, the Environmental Protection Agency (EPA)  
6 approves all pesticide labels. A damage award for pre-1972 failure to  
7 warn would not change the present labeling process, nor would it  
8 require changes in existing labels. Existing labels are protected by  
9 FIFRA.”<sup>3</sup>

10 The same is true with respect to awarding damages to e-cigarette consumers, like  
11 Plaintiffs here, who purchased before the Final Rule came into effect.

12 Notably the only three times that *Akee* has been cited for anything relating to  
13 preemption have been to distinguish it<sup>4</sup> and/or show why *Southwest Center for*  
14 *Biological Diversity v. U.S. Dep’t of Agriculture*, on which it relies, is inapplicable  
15 to facts like those in the case at bar.<sup>5</sup>

16 Moreover, courts in the Central District have distinguished *Southwest Center*  
17 numerous times on grounds relevant to this motion. Finding *Southwest* limited to its

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18 <sup>3</sup> While Defendants attempt to distinguish both FIFRA cases Plaintiffs cite on the  
19 basis of a Congressional historical note saying the FIFRA provision did not apply to  
20 earlier events, *Gibson*, 842 F. Supp. 938, 940, did not consider that note in its  
21 decision. Also, there is no analogous history at issue in *Feinberg*, 950 N.Y.S.2d 608  
(discussed Opening Mem. at 14; *infra* at 8-9), which concerns the FDCA.

22 <sup>4</sup> *Shell Oil Co. v. Franco*, No. CV 03-8846 NM (PJWx), 2004 U.S. Dist. LEXIS  
23 31125 (C.D. Cal. May 18, 2004) (distinguishing *Akee* because the case before it  
involved Nicaraguan law).

24 <sup>5</sup> See *Parthiban v. GMAC Mortg. Corp.*, No. SA CV 05-768 DOC (MLGx), 2006  
25 U.S. Dist. LEXIS 38433 (C.D. Cal. Mar. 1, 2006); *Phillips v. New Century Fin.*  
26 *Corp.*, No. SA CV 05-0692 DOC (RNBx), 2006 U.S. Dist. LEXIS 18498 (C.D. Cal.  
Mar. 1, 2006) (all discussed herein at 6-8).

1 facts and instead applying *Landgraf*, in *Phillips v. New Century Fin. Corp.*, No. SA  
2 CV 05-0692 DOC (RNBx), 2006 U.S. Dist. LEXIS 18498, at \*18 (C.D. Cal. Mar. 1,  
3 2006), the court held that:

4 the present case involves a scenario whereby defendants' actions gave  
5 rise to different legal consequences before and after the effective date  
6 of section 311(a). Before the amendment, consumers who received  
7 illegal credit solicitations could sue to ensure defendants' compliance  
8 with the law, whereas after FACTA, consumers could no longer sue  
9 privately and instead were forced to rely exclusively on administrative  
10 enforcement. See 15 U.S.C. §§ 1681m(h)(8), 1681s. ***The practical***  
11 ***effect of the change is that an entire class of plaintiffs is eliminated,***  
12 ***and defendants now face a significantly lesser chance of being held***  
13 ***liable. ... This constitutes impermissible retroactive effects and***  
14 ***counsels against applying the amendment to bar Plaintiff's claim.***

15 *Id.* at \*15-17 (C.D. Cal. Mar. 1, 2006) (emphasis supplied). This reasoning is  
16 equally applicable here.

17 Likewise, in *Fisher v. Fin. Am., LLC*, No. SACV 05-0888 CJC (RNBx), 2006  
18 U.S. Dist. LEXIS 36473, at \*\*9-10 (C.D. Cal. Jan. 23, 2006), a Central District  
19 court held that “[u]nlike in *Southwest Center*, application of the new law in this case  
20 would impair rights Plaintiff ‘possessed when he acted.’” The *Fisher* court  
21 described *Southwest Center* as finding there was no impermissible retroactive effect  
22 because “the plaintiffs had taken no action in reliance on the law as it existed at the  
23 time of their request,” and explained, “[a]lthough the Ninth Circuit did not explicitly  
24 say so, its holding appears to rest on a finding that the plaintiffs would have made  
25 the FOIA request even if the amendment limiting the information they could receive  
26 had been in effect at the time they made that request.” *Fisher*, 2006 U.S. Dist.  
27 LEXIS 36473, at n. 5. Here, in contrast, Plaintiffs did take action in reliance on the

1 law in its pre-Final Rule state. At the times they made their purchases, they had the  
2 right to believe their Blu e-cigarette packaging was free from material omissions  
3 about safety, and made their purchases in exercising faith in that right. At the time  
4 they so acted, they had the right to bring suit if material omissions existed. This  
5 case is directly analogous to *Fisher* where before FACTA (the new statute being  
6 applied retroactively) was enacted, “citizens who chose not to opt out had a private  
7 right of action for violations.” *Fisher*, 2006 U.S. Dist. LEXIS 36473, at \*23. *See*  
8 *also Parthiban v. GMAC Mortgage Corp.*, 2006 U.S. Dist. LEXIS 38433, SA CV  
9 05-768 DOC (C.D. Cal. 2006) (another FACTA case in which the Central District  
10 reached virtually identical conclusions).

11 Each of these cases relied not on *Southwest Center* but on *Scott v. Boos*, 215  
12 F.3d 940 (9th Cir. 2000) (cited in Plaintiffs’ Supplemental Mem. at 10), discussed  
13 above. It is thus clear that the Ninth Circuit and Central District courts have applied  
14 *Landgraf* in connection with a wide range of new regulations to find that revoking a  
15 cause of action from a plaintiff that already had that cause of action would have an  
16 impermissible retroactive effect.

17 In sum, *Akee* is neither persuasive nor binding, and Defendants have failed to  
18 refute that, upon reconsideration, the Court should hold that the has no retroactive  
19 effect because the Final Rule contains no language that states that it is expressly  
20 retroactive.

21 **C. Defendants’ Halfhearted Attempt to Distinguish *Feinberg*, Which**  
22 **Supports Plaintiffs’ Interpretation of “Continue in Effect,” Fails**

23 *Feinberg v. Colgate-Palmolive Co.*, 2012 NY Slip Op 50515(U) ¶¶ 3-4, 34  
24 Misc. 3d 1243(A), 950 N.Y.S.2d 608 (N.Y. Sup. Ct. 2012) supports that the  
25 language Defendants claim makes the Final Rule retroactive – “continue in effect” –  
26 in fact does not make a preemption clause retroactive. While *Feinberg* is an  
27 unpublished state court decision, it interprets a federal statute with the exact  
28 “continue in effect” language at issue here and cites to the Supreme Court’s seminal

1 *Landgraf* decision to support its retroactivity analysis and, therefore, at a minimum,  
2 the case is instructive. The distinctions that Defendants draw regarding the  
3 preemption analysis in *Feinberg* do not detract from the bedrock principle that an  
4 agency's rules do not have retroactive effect unless the new agency rule expressly  
5 states that it is retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204,  
6 208 (1988). As discussed in *Feinberg*, the Final Rule's "continue in effect"  
7 language does not constitute such an express retroactivity statement. *Lombardo v.*  
8 *Johnson & Johnson Consumer Companies, Inc.*, No. 13-60536-CIV, 2014 WL  
9 10044838, at \*\*2, 7 (S.D. Fla. Sept. 10, 2014), a false advertising case relating to  
10 sunscreen labeling (which like tobacco products is subject to the FDCA), illustrates  
11 the application of this principle that agency rules generally are not retroactive.  
12 There, the FDA promulgated a final rule (before the plaintiff's complaint was filed)  
13 that prohibited certain sunscreen labeling conventions. While the court found that  
14 claims based on product sold on or after June 17, 2011 (the date the final rule was  
15 enacted) were preempted, such preemption did not apply retroactively. *Id. Cf. Cort*  
16 *v. Crabtree*, 113 F.3d 1081, 1086-87 (9th Cir. 1997) (holding that unfavorable  
17 changes concerning sentencing reduction would not apply retroactively). Thus, for  
18 example, in *Segedie v. The Hain Celestial Grp., Inc.*, No. L 4-CV-5029 NSR, 2015  
19 WL 5916002, at \*6 (S.D.N.Y. Oct. 7, 2015), the court held that "[i]f the USDA  
20 were to issue a rule tomorrow permitting all of the challenged ingredients in organic  
21 foods, it would not apply retroactively to the products that Defendant labeled and  
22 sold over the past several years." *See also Poosh v. Philip Morris USA, Inc.*, 904  
23 F.Supp.2d 1009 (N.D. Cal. 2012); and *Bullock v. Phillip Morris USA, Inc.*, 159  
Cal.App.4th 655<sup>6</sup> (Cal. Ct. App. 2d. Dist. 2008)<sup>7</sup> (showing that preemption is

24 <sup>6</sup>*United States v. Wolflick & Simpson*, No. CV 15-09662 SJO (PLAx), 2016 U.S.  
25 Dist. LEXIS 146994, at \*10 (C.D. Cal. Sep. 22, 2016) (D. Mem. at 21) because  
26 there, the court found the argument it had previously failed to address meritless.  
Here, the unaddressed argument has merit.

typically applied only to claims based on activities after effective date).<sup>8</sup>

**IV. PLAINTIFFS' MOTION FOR RECONSIDERATION IS PROCEDURALLY PROPER**

In addition to being correct, Plaintiffs' motion for reconsideration is procedurally well-founded. Defendants toss out an array of assertions that the motion is procedurally improper, all of which are incorrect. In so doing, they resort to excessively narrow interpretations of the relevant Federal and Local Rules and ignore the import of the Court's inherent authority.

Put simply, "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Monaco v. Bear Stearns Cos.*, No. CV 09-05438 SJO (JCx), 2011 U.S. Dist. LEXIS 157803, at \*1 (C.D. Cal. Jan. 13, 2011). Courts in this District and elsewhere use a variety of procedural mechanisms to ensure that if an order is erroneous, they are able to correct it.<sup>9</sup> Defendants do not, and simply cannot, establish that this Court is barred from so doing on any of the bases that Plaintiffs have proffered.<sup>10</sup>

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<sup>7</sup> Contrary to Defendants' suggestion, citation to these cases is proper even though Plaintiffs cited them in their Supplemental Memorandum because the Court may not have reached them in its analysis since it found preemption began on August 8, 2016.

<sup>8</sup> Defendants' attempt to distinguish these cases (D. Mem. at 22) fails, because Plaintiffs do not cite them for an interpretation of "continue in effect," but for the principle that courts avoid applying new preemption rules to claims that arose before their effective dates.

<sup>9</sup> *Allergan, Inc. v. Athena Cosmetics, Inc.*, 2012 U.S. Dist. LEXIS 189655, at \*3 (C.D. Cal. 2012) (Selna, J.) (D. Mem. at 6) is inapposite. There, this Court found no clear error as "no court" had accepted an argument like the plaintiffs'. Here, courts have. See Opening Mem. at 14 -18 and *supra*, at 4-10.

<sup>10</sup> *Allergan* is also distinguishable because there, the court found "to the extent any argument was not made in opposition to the motion, [the movant] has not presented grounds for why it could not have been earlier presented," but, here, Plaintiffs have shown why the simultaneous supplemental briefing is such a reason. See *infra*, at 16.

**A. The Motion is Proper Under Rule 54(b) and Local Rule 7-18.**

Rule 54(b) and Local Rule 7-18, which permit revision of orders before entry of judgment, allow this Court to reconsider its Order. Defendants’ arguments to the contrary are unavailing. As a preliminary matter, Defendants make no reference to the standards governing Rule 54(b), and instead focus on the requirements of Local Rule 7-18. Defendants thus concede that, other than to the extent the Rule 54(b) provisions are mirrored in Local Rule 7-18, Plaintiffs have met them.

Defendants also give the relationship between the Federal Rules of Civil Procedure governing reconsideration and Local Rule 7-18 an overly restrictive construction. While the Local Rule does state that a motion for reconsideration shall be made only on one of three enumerated grounds, in practice, courts in the Central District addressing Local Rule 7-18 – regardless of whether the analysis accompanies a motion for reconsideration under 54(b), 60(b), 59(e) or other rules – regularly additionally cite to the broader standards set forth by the Ninth Circuit and Federal Rules. For example, in *Henderlong v. S. Cal. Reg’l Rail Auth.*, No. CV 14-03610 DDP (PLAx), 2014 U.S. Dist. LEXIS 156925, at \*2-4 (C.D. Cal. Nov. 5, 2014), after quoting Local Rule 7-18, the court stated that “[r]econsideration is appropriate if the district court . . . committed clear error,” *id.* (citing *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)), and went on to consider a legal issue – the applicability of a California statute to the plaintiff’s retaliation claim – and granted reconsideration. Likewise, in *Galvan v. City of L.A.*, No. 2:14-cv-00495-CAS (AJWx), 2016 U.S. Dist. LEXIS 129888, at \*2-3 (C.D. Cal. Sep. 21, 2016), after setting forth the Local Rule 7-18 standard, the court went on to hold, “[f]urthermore, the Court retains authority to modify its interlocutory orders where it identifies error,” – a principle for which it cites Rule 54 and *United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000). Indeed, this Court itself, despite finding that the movant “ha[d] not fulfilled the requirements of

1 Local Rule 7-18,” held, citing, *inter alia*, Rule 54(b), that it “has the inherent  
2 authority to reexamine its prior decisions prior to the entry of judgment.” *Network*  
3 *Signatures, Inc. v. ABN-AMRO, Inc.*, No. SACV 06-629 JVS (RNBx), 2007 U.S.  
4 Dist. LEXIS 48332, at \*5 (C.D. Cal. Apr. 10, 2007) (Selna, J.). In *Network*  
5 *Signatures*, this Court went on to consider the legal issue of whether a certain  
6 defendant had “‘all substantial rights’ to [a patent] for the purposes of standing.”  
7 *Id.*<sup>11</sup>

8 Courts have applied Local Rule 7-18 with flexibility in connection with every  
9 Federal Rule under which motions for reconsideration are made. For example, in  
10 *Qubadi v. Hazuda*, No. CV 14-06310 MMM (PJWx), 2015 U.S. Dist. LEXIS  
11 104750, at \*10-12 (C.D. Cal. Aug. 10, 2015) (cited in D. Mem. at 11), on a motion  
12 for reconsideration under Local Rule 7-18 and Rule 59(e), neither of which  
13 specifically mentions “clear error” or “manifest injustice,” a Central District court  
14 held that “[i]t does appear ... that based on Hazuda’s prompting, the court  
15 misinterpreted Ninth Circuit precedent,” then granted reconsideration because  
16 “[r]econsideration is warranted where a district court committed clear error or the  
17 initial decision was manifestly unjust.” *Id.* Thus, Local Rule 7-18 does not limit  
18 54(b) in a manner that precludes Plaintiffs’ claims here.

18 **1. Reconsideration Is Warranted Under Local Rule 7-18(c)**

19 Contrary to Defendants’ contention, reconsideration is warranted under Local  
20 Rule 7-18(c), which provides for reconsideration where there is “a manifest showing  
21 of a failure to consider material facts presented to the Court before such decision.”  
22 While the provision itself references failure to consider “material facts,” courts in  
23 the Central District have applied it to errors of law, and granted reconsideration. For  
24

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25 <sup>11</sup> See also *Meggitt (Orange Cty.), Inc. v. Nie Yongzhong*, No. SACV 13-0239-DOC  
26 (DFMx), 2014 U.S. Dist. LEXIS 155473, at \*5-9 (C.D. Cal. Nov. 3, 2014) (citing  
only Rule 54(b)) (cited in Plaintiffs’ Opening Mem. at 9).

1 example, in *Henderlong v. S. Cal. Reg'l Rail Auth.*, No. CV 14-03610 DDP (PLAx),  
2 2014 U.S. Dist. LEXIS 156925, at \*2-4 (C.D. Cal. Nov. 5, 2014), the court found  
3 “that Defendant brings this motion for reconsideration on the grounds of the Court’s  
4 failure to consider a material fact presented to it” but that “fact” was actually a legal  
5 issue – the applicability of a California statute to the plaintiff’s claim. Moreover, in  
6 the Order, this Court did not consider the “material fact” that application of the Final  
7 Rule would deprive Plaintiffs of vested claims.

8 *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2015 U.S. Dist. LEXIS 174514, at  
9 \*5 (C.D. Cal. Feb. 19, 2015) and *Dairy Emples. Union Local No. 17 Christian*  
10 *Labor Ass’n v. Dairy*, 2015 U.S. Dist. LEXIS 56401, at \*2 (C.D. Cal. Apr. 28,  
11 2015) (D. Mem. at 6, 9-10) are inapposite. In *Flo & Eddie*, the court noted that the  
12 party seeking reconsideration had not previously presented the Supreme Court case  
13 that it later argued the court “failed to consider,” while here, Plaintiffs contend the  
14 Court failed to consider certain cases that Plaintiffs *did* include in their  
15 Supplemental Memorandum. *See* Opening Mem. at 18; *see also id.* at 15-17. And in  
16 *Dairy Employees*, 2015 U.S. Dist. LEXIS 56401, at \*2, although the court said it  
17 was denying reconsideration, the court ultimately analyzed the substantive legal  
18 arguments the movants made and found that those arguments, unlike the legal  
19 arguments Plaintiffs make here about retroactivity, were defective. Thus,  
20 Defendants’ cited cases cannot refute that the Court should reconsider its ruling  
under Local Rule 7-18(c).

21 **2. In the Alternative, Reconsideration Is Warranted Under**  
22 **Local Rule 7-18(a)**

23 Defendants also err in arguing that reconsideration is not warranted under  
24 Local Rule 7-18(a). This subsection of the Local Rule provides for reconsideration  
25 where there is a “material difference in fact or law from that presented to the Court  
26 before such decision that in the exercise of reasonable diligence could not have been  
27 known to the party moving for reconsideration at the time of such decision.” Here,

1 Plaintiffs seek to draw the Court's attention to law of which they could not  
2 reasonably have been previously expected to be aware.

3 In opposing Defendants' motion to dismiss, Plaintiffs read the "continue in  
4 effect" language in the Final Rule with its plain meaning – *i.e.*, that if the Final Rule  
5 was preemptive, that meant that, after the effective date, state laws could not  
6 continue to be applied with respect to new consumer transactions – not that the new  
7 rule would be applied retroactively to sales that were made long before the Rule was  
8 finalized. Defendants did not offer a contrary meaning in their motion to dismiss,  
9 or, indeed, in their reply on that motion. Defendants *concede* that they raised their  
10 argument concerning the meaning of the language "continue in effect" *for the first*  
11 *time* in the concurrent Supplemental Briefing. D. Mem. at 7. Because the  
12 supplemental briefing was simultaneous, Plaintiffs had no reason to guess the new  
13 spin that Defendants would put on the language, and had no opportunity to respond  
14 to it. Plaintiffs could not reasonably be expected to anticipate that Defendants  
15 would misrepresent the validity and relevance of the only cases they cited in favor  
16 of their interpretation, and because there was no subsequent briefing or oral  
17 argument, Plaintiffs had no opportunity to respond.<sup>12</sup> These circumstances call for  
18 relief under Local Rule 7-18(a).

19 *Fadhliah v. Societe Air Fr.*, 987 F. Supp. 2d 1057, 1069 (C.D. Cal. 2013), on  
20 which Defendants rely, is inapposite. Unlike here, the defendants in *Fadhliah*  
21 argued *in their opening brief* that jurisdiction was improper because the plaintiffs  
22 there lived in Saudi Arabia, and the plaintiffs, in their opposition, *expressly chose*  
23 *not to* provide contradictory evidence. *Golden v. O'Melveny & Meyers LLP*, 2016  
24 U.S. Dist. LEXIS 103621, at \*10 (C.D. Cal. Aug. 3, 2016) (D. Mem. 7), also is

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25 <sup>12</sup> See discussion of the irrelevance of those cases, *Bradley v.*, 416 U.S. at 711, *Riegel*  
26 *v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008), and *Montclair v. Ramsdell*, 107 U.S.  
147, 152 (1882), in Opening Mem. at 12-13.

1 inapposite. There, a party that ultimately moved for reconsideration of an order  
2 compelling arbitration had, at first, not disputed that the claims were arbitrable.  
3 Then, after arbitration was underway, a decision in an unrelated case alerted them to  
4 an argument they could have made against arbitration. On this Motion, Plaintiffs  
5 address arguments made by Defendants in their Supplemental Memorandum, which  
6 were considered by this Court, and to which Plaintiffs had no opportunity to respond  
7 because the parties filed their Supplemental Memorandum simultaneously.

8 Plaintiffs cannot be expected to anticipate every conceivable argument that a  
9 defendant might make in a given motion. It is appropriate in opposing a motion to  
10 respond only to the arguments actually made. *Cf. All. for the Wild Rockies v.*  
11 *Kruger*, No. CV 12-150-M-DLC, 2014 U.S. Dist. LEXIS 2825, at \*3 (D. Mont. Jan.  
12 3, 2014) (“While Defendants are correct that some of these issues were not raised in  
13 Plaintiffs’ initial motion, Plaintiffs were not required to predict every possible  
14 argument Defendants would raise and respond to them in advance”); *Square D Co.*  
15 *v. Breakers Unlimited, Inc.*, No. 1:07-cv-806-WTL-JMS, 2009 U.S. Dist. LEXIS  
16 42850, at \*10 (S.D. Ind. May 19, 2009) (party was “not required to anticipate this  
17 argument in its opening brief and had every right to respond to it in its reply brief.”).  
18 While the foregoing cases concern parties’ rights to respond in reply briefs to  
19 arguments that had been made in opposition briefs, their holdings on the lack of  
20 requirement that parties guess each other’s arguments in advance is applicable here,  
21 as this is an unusual case in which after Defendants’ reply brief, the Court requested  
22 briefing on new issues, and asked that the briefing be submitted simultaneously.  
23 Plaintiffs could not be expected to anticipate that Defendants would misrepresent  
24 the validity and relevance of the only cases they cited in favor of their interpretation,  
25 and had no opportunity to reply. Thus, Local Rule 7-18(a) is a proper basis for  
26 reconsideration.

**B. The Motion Is Also Proper Under Rule 60(b)(2)**

The Court may properly reconsider its Order under Rule 60(b)(2). Defendants are mistaken in arguing that, because not every single claim and every single plaintiff was dismissed, the Order dismissing all but one of the claims and plaintiffs with prejudice is interlocutory and cannot be brought up for review under Rule 60(b)(2).<sup>13</sup> On numerous occasions, this Court and other district courts in California have applied Rule 60(b) in granting reconsideration to orders dismissing some, but not all, claims or parties. For example, in *Lions Gate Entm't, Inc. v. TD Ameritrade Holding Corp.*, No. CV 15-05024 DDP (Ex), 2016 U.S. Dist. LEXIS 101234, at \*\*5-10 (C.D. Cal. Aug. 1, 2016) (cited at Opening Mem. at 8, 9), the court granted reconsideration of an order partially granting a motion to dismiss – exactly what Plaintiffs are seeking here – under Rule 60(b) and Local Rule 7-18. *See also Forest Ambulatory Surgical Assocs., L.P. v. United Healthcare*, No. CV 12-2916 PSG (FFMx), 2014 U.S. Dist. LEXIS 186393, at \*3-4 (C.D. Cal. Feb. 12, 2014) (plaintiffs sought reconsideration of an order partially dismissing their complaint and court declined to reconsider under Local Rule 7-18, but did, citing Rule 60(b), grant the “request to revisit the December 2013 Order in light of the inadvertent rhetorical ambiguity of that Order.”). In *Cohea v. Adams*, No. 1:08-cv-01186-LJO-YNP PC, 2009 U.S. Dist. LEXIS 107497, at \*3-5 (E.D. Cal. Nov. 17, 2009), the court likewise cited to Rule 60(b) when granting reconsideration of an order “dismissing certain claims from this action.” *See also Monaco v. Bear Stearns Cos.*, No. CV 09-05438 SJO (JCx), 2011 U.S. Dist. LEXIS 157803, at \*1 (C.D. Cal. Jan. 13, 2011) (relying on 60(b) in granting reconsideration of order dismissing

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<sup>13</sup> Defendants are wrong in arguing that by requesting (as alternative relief) certification for interlocutory appeal, Plaintiffs concede that the Rule 60(b) standard does not apply. D. Mem. at 1. *See Hillis v. Heineman*, 626 F.3d 1014, 1018 (9th Cir. 2010) (referencing “the important and constructive principle of our adversary system that parties may argue alternative positions without waiver”).

1 certain claims but not others with prejudice and amending order so those claims  
2 were dismissed without prejudice). Accordingly, Rule 60(b) also is an appropriate  
3 mechanism by which the Court may reconsider the Order.

4 **C. Reconsideration Also Is Proper Under the Court's Inherent Powers**

5 Finally, as Defendants concede, a court may exercise its inherent authority to  
6 grant reconsideration "to correct clear error [or] avoid manifestly unjust results." D.  
7 Mem. at 11. Plaintiffs have shown that the Order contains such clear error and  
8 works a manifest injustice. Thus, even if Plaintiffs did not satisfy the requirements  
9 of Rule 54(b), Rule 60(b), and/or Local Rule 7-18 (which Plaintiffs do), Plaintiffs  
10 nonetheless show that reconsideration should be granted.

11 "This Court has the inherent authority to reexamine its prior decisions prior  
12 to the entry of judgment." *Network Signatures, Inc.*, 2007 U.S. Dist. LEXIS 48332,  
13 at \*5 (C.D. Cal. Apr. 10, 2007). The United States Supreme Court has held that "[a]  
14 court has the power to revisit prior decisions of its own or of a coordinate court **in**  
15 **any circumstance**, although as a rule courts should be loathe to do so in the absence  
16 of extraordinary circumstances such as where the initial decision was 'clearly  
17 erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus.*  
18 *Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 2178 (1988) (emphasis  
19 supplied). Indeed, "[a]s to inherent authority, a district court may reconsider and  
20 modify an interlocutory decision for any reason it deems sufficient, **even in the**  
21 **absence of new evidence or an intervening change in or clarification of**  
22 **controlling law.**" *Blackburn v. Sturgeon Servs. Int'l*, No. 1:13-cv-00054 - JLT,  
23 2014 U.S. Dist. LEXIS 42412, at \*3 (E.D. Cal. Mar. 27, 2014) (emphasis supplied).  
24 The cases Defendants cite do not warrant a finding to the contrary. Notably, all  
25 cases that Defendants cite in their opposition (at 11) *grant* motions for

1 reconsideration.<sup>14</sup> In *Jenhanco, Inc. v. Hertz Corp.*, 2016 U.S. Dist. LEXIS 9763, at  
2 \*5 (C.D. Cal. Jan. 26, 2016) (Def. Mem. at 13), no reference is made to “inherent  
3 authority,” and, moreover, the court had analyzed in detail in its initial order the  
4 language plaintiffs alleged it had failed to consider (*i.e.* distinguishing between the  
5 meaning of “in” and “of”). The Order here did not have such detailed analysis.<sup>15</sup>

6 Defendants are wrong in asserting that Central District precedent does not  
7 support reconsideration here. This Court’s ruling in *Network Signatures*, 2007 U.S.  
8 Dist. LEXIS 48332, at \*5 (cited in Plaintiffs’ Opening Mem. at 8, 10), which  
9 Defendants ignore, is closely analogous to this case. There, the court granted  
10 reconsideration and addressed an issue it had not fully analyzed previously even  
11 though the movant, unlike Plaintiffs here, failed to identify highly unusual  
12 circumstances, clear error or manifest injustice. Moreover, *City of Los Angeles,*  
13 *Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001)  
14 (Plaintiffs’ Opening Mem. at 10), makes clear that, even if the movant did not meet  
15 the requirements of the civil procedure rule there applicable, the court could rescind  
16 or reconsider an order on its inherent power.

17 Also, Defendants’ distinction of *Bloch v. Prudential Ins. Co. of Am.*, 2005  
18 U.S. Dist. LEXIS 47534 (C.D. Cal. Aug. 9, 2005), is flawed. Just as Judge Hatter in  
19 *Bloch* provided no explanation of why the plaintiffs’ breach of contract claim was

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20 <sup>14</sup>*Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, No. 2:16-158 WBS AC,  
21 2016 U.S. Dist. LEXIS 143545, at \*15 (E.D. Cal. Oct. 17, 2016) does not expressly  
22 address “inherent authority,” and moreover, was factually inapposite, in that it  
23 concerned refusal to find clear error in interpreted two provisions of California  
Insurance Code consistently with one another – a determination specific to those  
provisions.

24 <sup>15</sup> *Thompson v. Ventura Cnty. Sheriff Dep’t*, No. CV 16-6622 SJO(JC), 2016 U.S.  
25 Dist. LEXIS 158127 (C.D. Cal. Nov. 10, 2016), similarly does not reference  
26 “inherent authority,” and otherwise provides no guidance for this case, as it does not  
indicate what, if any, error the party seeking reconsideration alleged was made.

1 dismissed, here the Court has not given an explanation of why the *Landgraf*  
2 retroactivity standard does not apply to preemption statutes, just as it does to all  
3 manner of other statutes that were not specifically at issue in *Landgraf*.

4 Moreover, still other Central District precedent similarly supports  
5 reconsideration here. In *Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711  
6 DOC (ANx), 2011 U.S. Dist. LEXIS 103584, at \*13 n.3 (C.D. Cal. Aug. 31, 2011),  
7 the court granted reconsideration on its inherent authority to vacate an order where it  
8 had erred as to a requirement for stating a claim. Here, Plaintiffs respectfully  
9 submit, the Court has erred by applying an inappropriate standard for retroactive  
10 application, resulting in the dismissal of several claims, and thus reconsideration is  
11 similarly warranted.

12 As described in Plaintiffs' Opening Memorandum, the Order reflects certain  
13 errors that, in the interest of fairness and judicial accuracy, should be corrected.  
14 Opening Mem. at 11-19, and *supra* at Section III(A) – (C).

15 In addition, Defendants fail to refute that the Order has an unjust impact on  
16 Plaintiffs' substantive rights. The Order deprives Plaintiffs of rights they clearly  
17 had and relied on at the time they purchased their Blu e-cigarettes – a right to a  
18 warning label that did not omit material information, and the right to sue for  
19 damages if a warning label did omit such information. *See, e.g., Fisher*, 2006 U.S.  
20 Dist. LEXIS 36473, at \* 23. The Order extinguishes Plaintiffs' substantive rights  
21 and gives Defendants a free pass for conduct that occurred long before the Effective  
22 Date of the Final Rule without engaging in a retroactivity analysis required by  
23 Supreme Court precedent. As the Supreme Court explained in *Landgraf*, 511 U.S.  
24 at 265, “settled expectations should not be lightly disrupted.” *See, e.g., Johnson v.*  
25 *Hewlett-Packard Co.*, No. C 09-03596 CRB, 2014 U.S. Dist. LEXIS 30870, at \*20  
26 (N.D. Cal. Mar. 10, 2014) (declining to apply an amended statute to a pending case  
27 where “[u]nlike *Bradley*, applying [it] would inhibit a party’s right to fees instead of

1 providing an alternative basis for an award, and therefore would upset the  
2 reasonable expectations of the parties.”).<sup>16</sup> Thus, for example, the Ninth Circuit has  
3 declined to apply a new rule to a pending case on the basis that it would be  
4 “manifestly unjust” and have a “genuinely retroactive effect,” where to apply it  
5 retroactively “would cut off [the plaintiffs’] claims when, without the amendment,  
6 [the plaintiff] still could [have] sue[d] at any time during the following three  
7 months.” *TwoRivers v. Lewis*, 174 F.3d 987, 995 (9th Cir. 1999).<sup>17</sup>

8 **1. Defendants’ Argument that the Final Rule is Not Retroactive**  
9 **Due to Earlier Notice of Potential Regulation Is Nonsensical**

10 Defendants argue that Plaintiffs cannot argue against the Final Rule being  
11 applied retroactively because, “in 2016, FDA specifically stated: ‘On April 25,  
12 2011, FDA issued a letter to stakeholders indicating its intent to deem additional  
13 tobacco products, including e-cigarettes, to be subject to FDA’s authorities,’” and  
14 that thus “‘manufacturers ... were on notice ...that they could and likely would’” be  
15 regulated. (D. Mem. at 15.) This argument is nonsensical. First, Plaintiffs are not  
16 manufacturers. Moreover, no one knew exactly what the Final Rule would say until  
17 it was finalized, on May 10, 2016. Also, this Court has found that it did not become  
18 effective prior to its effective date, August 8, 2016. Order at 14. Defendants cannot  
19 credibly argue that Plaintiffs were somehow limited by the Final Rule before it  
20 existed.

21 \* \* \* \* \*

22 <sup>16</sup> Moreover, as noted in Plaintiffs’ Opening Memorandum at 19, if Plaintiffs are  
23 forced to wait until the end of litigation to correct the errors in the Order, evidence  
may be lost as witnesses’ memories deteriorate.

24 <sup>17</sup> All of the cases that Defendants cite in the “Unjust Impact” section of their  
25 memorandum (D. Mem. at 12-14) are irrelevant as those cases are actually cited for  
26 propositions relating to “clear error” or to the Local Rule 7-18 prohibition against  
repetition of arguments, and not injustice.

1 In summary, the Motion meets both the substantive and procedural  
2 requirements for reconsideration. Plaintiffs respectfully submit it should be granted.

3 **V. IN THE ALTERNATIVE, THE COURT SHOULD ENTER PARTIAL**  
4 **JUDGMENT**

5 If the Court denies the foregoing requested relief, it should enter final  
6 judgment pursuant to Rule 54(b) for the Dismissed Plaintiffs as to the Dismissed  
7 Claims as well as to the CAC Dismissed Claims (Claims I, II, III, V, and VII of the  
8 Consolidated Amended Complaint) because there is “no just reason for delay.” Fed.  
9 R. Civ. P. 54(b). The Court fully disposed of the Dismissed Claims, and but for the  
10 pendency of Count IV<sup>18</sup> – which Plaintiff Whitney initially brought as an  
11 independent action in a different forum and then agreed to transfer to this District  
12 and consolidate with this action at Defendants’ request (*see* Dkt. 39) – Plaintiffs  
13 would be free to pursue their appeal as of right. This satisfies the first step in the  
14 Rule 54(b) analysis. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8  
15 (1980) (requiring a judgment that is final). The Dismissed Claims also are easily  
16 separable from Count IV. To the extent that Plaintiffs may appeal from the  
17 previously dismissed affirmative misrepresentation portions of the CAC Dismissed  
18 Claims, it will have no impact on the remaining Count IV because, as a Proposition  
19 65-based claim, it relates only to misrepresentations by omission, not affirmative  
20 misrepresentations. Thus, the second factor of preventing successive appeals on the  
21 same issue also is satisfied. *See De La Torre v. CashCall, Inc.*, No. 08-CV-03174-  
MEJ, 2014 WL 7277377, at \*2 (N.D. Cal. Dec. 22, 2014).

22 The equities also favor granting entry of partial judgment. Defendants have  
23 not identified any prejudice they will suffer if an immediate appeal proceeds.  
24 Instead, Defendants argue that an immediate appeal is improper because the case is

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25 <sup>18</sup> Count IV is for violation of the UCL under the “unlawful prong” based on an  
26 underlying violation of Proposition 65. *See* SAC, ¶¶156-78.

1 stayed pending the resolution of certain Ninth Circuit appeals. This argument is  
2 meritless. D. Mem. at 23. First, the Ninth Circuit now has decided both *Brazil* and  
3 *Briseno*, and the continued relevance of *Jones* to this action is uncertain; therefore, it  
4 is likely the stay could be lifted shortly.<sup>19</sup> But even if the case continues to be  
5 stayed, Defendants' argument fails to demonstrate that an immediate appeal of the  
6 Dismissed Claims will result in later duplicative proceedings. See *Texaco, Inc. v.*  
7 *Ponsoldt*, 939 F.2d 794, 797 (9th Cir.1991). To the contrary, what would be at issue  
8 in the appeal from the dismissal is completely separate from the damages calculation  
9 methods at issue in the *Jones* appeal on which the stay is based. This is evidenced  
10 by the fact that this case was not stayed with respect to the dismissal motion. If  
11 Plaintiffs are successful on an appeal (and the litigation of the remaining Count IV is  
12 stayed), they would be able to rejoin the case below and all Plaintiffs and claims  
13 could proceed together, maximizing judicial efficiency. Conversely, if Plaintiffs  
14 were required to wait until the end of the case and then appeal, and Plaintiffs were  
15 then successful on appeal (which could take two years or more),<sup>20</sup> an entirely new  
16 trial, as well as new discovery on damages, would be required. Thus, all  
17 considerations weigh in favor of entering partial judgment under Rule 54(b).

18 **VI. IN THE ALTERNATIVE, THE COURT SHOULD CERTIFY THE**  
19 **PREEMPTION ISSUE FOR INTERLOCUTORY APPEAL**

20 Should the Court deny all of the foregoing relief, the Court should certify the  
21 preemption issues (including, but not limited to, retroactivity) for interlocutory

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22 <sup>19</sup> Since Defendants filed their brief, the Ninth Circuit ruled in *Briseno v. ConAgra*  
23 *Foods, Inc.*, No. 15-55727. See 2017 WL 53421 and 2017 WL 24618 (9th Cir. Jan.  
24 3, 2017). Only the appeal in *Jones v. ConAgra Foods, Inc.*, No. 14-16327, remains  
25 pending. *Jones*, however, is stayed (Dkt. No. 75 (9th Cir. Dec. 12, 2015)) until the  
26 Supreme Court decides *Microsoft Corp. v. Baker*, 136 S. Ct. 890, 890-91 (2016).

27 <sup>20</sup> The Ninth Circuit's website states that an appeal can take between 15 and 32  
28 months to decide. See <http://www.ca9.uscourts.gov/content/faq.php> (FAQs 17-18).

1 appeal pursuant to 28 U.S.C. §1292(b) because: (1) its ruling on preemption  
2 involves a “controlling issue of law” (2) on which there is a “substantial ground for  
3 difference of opinion” in light of an opposite determination on the same issue in  
4 *Greene v. Five Pawns, Inc.*, No. SA CV 15-1859 (C.D. Cal. Aug. 30, 2016); and (3)  
5 “an immediate appeal from the order may materially advance the ultimate  
6 termination of the litigation.” 28 U.S.C. §1292(b); *see, e.g., Beaver*, 816 F.3d at  
7 1178 (court of appeals considering preemption issue on interlocutory appeal);  
8 *Nutrishare, Inc. v. Connecticut Gen. Life Ins. Co.*, No. 2:13-CV-02378-JAM-AC,  
9 2014 WL 2624981, at \*4 (E.D. Cal. June 12, 2014) (granting interlocutory appeal on  
10 preemption issue); *Hawaii ex rel. Louie v. JP Morgan Chase & Co.*, 921 F. Supp. 2d  
11 1059, 1068 (D. Haw. 2013) (same). Conceding that the first two factors are  
12 satisfied, Defendants’ only argument against certification for interlocutory appeal is  
13 that such an appeal cannot advance the termination of this litigation because the case  
14 presently is stayed. D. Mem. at 23-24. This argument is unpersuasive. The fact  
15 that the case presently is stayed *favours* orderly and expeditious resolution of this  
16 matter, particularly because the preemption issue for which certification is sought  
17 has nothing to do with the damages calculation methods at issue in the *Jones* appeal  
18 on which the stay is based. As discussed above, if certification for an interlocutory  
19 appeal is granted, Plaintiffs respectfully submit that a continued stay of the action  
20 below would be warranted so that if Plaintiffs are successful on that appeal, they  
21 would be able to rejoin the case below and all Plaintiffs and claims could proceed  
22 together, maximizing judicial efficiency. Accordingly, certification of the  
23 preemption issue for interlocutory appeal is warranted.

## 23 **VII. CONCLUSION**

24 For all of the foregoing reasons and for those set forth in Plaintiffs’ Opening  
25 Memorandum, Plaintiffs respectfully submit that the motion for clarification should  
26 be granted, and the Order should be clarified to state that the Dismissed Claims are

1 dismissed only insofar as they concern conduct on and after August 8, 2016. If such  
2 relief is not granted, in the alternative, Plaintiffs submit that reconsideration of the  
3 relevant portions of the Order is warranted, and upon reconsideration,  
4 Plaintiffs' claims should be reinstated except to the extent that they concern conduct  
5 on and after August 8, 2016. If neither of the foregoing is granted, for the reasons  
6 set forth above, judgment should be entered under Rule 54(b) as to the Dismissed  
7 Claims, the CAC Dismissed Claims and the Dismissed Plaintiffs. Finally, if the  
8 Court does not grant any of the foregoing, all those portions of the Order concerning  
9 preemption should be certified for immediate appeal pursuant to § 28 U.S.C.  
10 1292(b).

11 Dated: January 17, 2017

**BISNAR | CHASE LLP**

12 By: Jerusalem F. Beligan

13 BRIAN D. CHASE  
bchase@bisnarchase.com  
JERUSALEM F. BELIGAN  
jbeligan@bisnarchase.com  
1301 Dove Street, Suite 120  
Newport Beach, CA 92660  
Telephone: 949/752-2999  
Facsimile: 949/752-2777

**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLP**

18 JANINE L. POLLACK  
pollack@whafh.com  
DEMET BASAR  
basar@whafh.com  
KATE M. MCGUIRE  
mcguire@whafh.com  
270 Madison Avenue  
New York, New York 10016  
Telephone: 212/545-4600  
Facsimile: 212/545-4653

**LEVI & KORSINKSY LLP**

24 EDUARD KORSINSKY  
ek@zlk.com  
SHANNON L. HOPKINS  
shopkins@zlk.com  
NANCY A. KULESA

27 -24 -

28 PLAINTIFFS' REPLY MEM. IN FURTHER SUPPORT OF MOTION FOR CLARIFICATION  
OR RECONSIDERATION, OR, IN THE ALTERNATIVE, ENTRY OF JUDGMENT  
PURSUANT TO FRCP 54(b), OR CERTIFICATION FOR INTERLOCUTORY APPEAL

1 nkulesa@zlk.com  
STEPHANIE A. BARTONE  
2 sbartone@zlk.com  
30 Broad Street, 24th Floor  
3 New York, NY 10004  
Telephone: 212/363-7500  
4 Facsimile: 866/367-6510

5 **LEXINGTON LAW GROUP**  
MARK N. TODZO  
6 mtodzo@lexlawgroup.com  
LUCAS WILLIAM  
7 lwilliams@lexlawgroup.com  
503 Divisadero Street  
8 San Francisco, CA 94117  
Telephone: 415/913-7800  
9 Facsimile: 415/759-4112

10 **SCOTT+SCOTT LLP**  
CHRISTOPHER M. BURKE  
11 cburke@scott-scott.com  
JOHN T. JASNOCH  
12 jjasnoch@scott-scott.com  
707 Broadway, Suite 1000  
13 San Diego, CA 92101  
Telephone: 619/233-4565  
14 Facsimile: 619/233-0508

15 **COHELAN KHOURY & SINGER**  
TIMOTHY D. COHELAN  
16 tcohelan@ckslaw.com  
ISAM C. KHOURY  
17 ikhoury@ckslaw.com  
MICHAEL D. SINGER  
18 msinger@ckslaw.com  
JEFF GERACI  
19 jgeraci@ckslaw.com  
605 "C" Street, Suite 200  
20 San Diego, CA 92101  
Telephone: 619/595-3001  
21 Facsimile: 619/595-3000

22 **LAW OFFICES OF MICHAEL P.**  
23 **SOUSA, APC**  
MICHAEL P. SOUSA  
24 msousa@msousalaw.com  
3232 Governor Drive, Suite A  
25 San Diego, CA 92122  
Telephone: 858/453-6122  
26 Facsimile: 858/453-2155

27 -25 -

**JOSE GARAY, APLC**  
JOSE GARAY  
jgaray@garaylaw.com  
9861 Irvine Center Drive  
Irvine, CA 92618  
Telephone: 949/208-3400  
Facsimile: 949/713-0432

**THE WILNER FIRM, P.A.**  
RICHARD J. LANTINBERG  
rlantinberg@wilnerfirm.com  
444 E. Duval Street  
Jacksonville, FL 32202  
Telephone: 904/446-9817  
Facsimile: 904/446-9825

**FORCHELLI CURTO DEEGAN  
SCHWARTZ MINEO & TERRANA,  
LLP**  
ELBERT NASIS  
enasis@forchellilaw.com  
The Omni  
333 Earle Ovington Boulevard, Suite 1010  
Uniondale, NY 11553  
Telephone: 516/248-1700  
Facsimile: 516/248-1729

Attorneys for Plaintiffs

791306